KAYAT & ANOR. v. LIM YEW SENG

[O.C.J. (Syed Othman J.) September 5, 1971]

[Johore Bahru — Civil Suit No. 197 of 1965]

Negligence — Collision — Liability — Car driven by person other than owner — Presumption raised that driver was servant or agent of owner — Burden of proof on owner to rebut presumption by proof of actual facts — Effect of remaining silent.

Evidence — Presumption — Effect of silence.

Practice and Procedure — Pleadings — Denial must be specific.

The plaintiffs claimed for damages for injuries caused by the negligence of the defendant's servant or agent in driving his car. The only point to be determined was liability.

It was contended for the defence that: (1) the defendant could not be held liable even if the court accepted the plaintiffs' evidence fully, as there was no evidence to show who was the driver of the car, any connection between him and the defendant, and that the driver was the servant or agent of the defendant, the car owner; (2) although it was stated in the statement of claim that the servant or agent of the defendant was one Neo Yong Nam, the averment of the defence was to put the plaintiffs to proof of all the allegation.

The plaintiffs contended that as in the indorsement the name of the driver was given, the onus was on the defendant, as owner of the car, to prove that the driver was not his servant or agent or that the car was driven by a person without his permission.

Thus, in addition, the court also had to determine which party had the burden of proof on the issue whether the driver of the car was the servant or agent of the owner.

Held: (1) where a car is driven by a person other than the owner, the presumption raised is that the driver of the car is the servant or agent of the owner. The rule is so laid down because in the course of human conduct, whether or not the driver is the servant or agent of the owner, or whether or not there is connection between the driver and the owner, should be within the knowledge of the owner of the car;

(2) in the present case, it was admitted that the defendant was the owner of the car. The presumption raised was that the driver was his servant or agent. It was for the defendant to rebut the presumption by proof of the actual facts. Since he chose to remain silent, the irresistible conclusion was that the driver was his servant or agent.

Cases referred to:-

(1) *Hewitt* v. *Bovin* [1940] 1 K.B. 188.

(2) *Rambarran* v. *Gurrucharran* [1970] 1 All E.R. 749.

(3) *Barnard* v. *Sully* (1931) 47 T.L.R. 557.

CIVIL SUIT.

J. L. R. Pillai for the plaintiffs.

Sachi Saurajen for the defendant.

Cur. Adv. Vult.

Syed Othman J.: The plaintiffs' claim is for damages for injuries caused by the negligence of the defendant's servant or agent in driving his car.

In the course of the hearing counsel for the defence admits that the defendant was the owner of the car.

The only point to be determined is liability.

The plaintiffs are father and son. Their case is as follows. The second plaintiff, the son, was riding his motorcycle with the father at the pillion from Sedenak along Ayer Hitam — Johore Bahru road. Between 8.00 and 9.00 p.m. he came to the junction leading to Pontian at 10¼ milestone. He gave signals indicating that he was turning right into the junction. He was then about half a chain away from the junction and was in the centre of the road. There was no oncoming vehicle, but he could see the beam of lights of vehicles from the rear. As he was making the turn, a car came from the rear and knocked his motorcycle on its right side. Both he and the father fell and were injured.

The defence does not call any evidence but relies on submission.

The sketch plan which forms part of the agreed bundle of documents shows the motorcycle lying at rest on the grass verge on the left hand side of the road towards Johore Bahru and directly opposite the junction. The width of the road near the junction is given at 27 feet 4 inches. There is a blood spot 4 feet 2 inches from the left side of the road. In the absence of evidence to the contrary, the conclusion to be drawn is that this must be the spot where one of the plaintiffs must have fallen from the motorcycle. The indications are that the motorcycle must have been somewhere near the centre of the road when the car hit it. The damage on the motorcycle was on the right side from the starter to the rear mudguard. On the evidence that has been adduced, I am satisfied that the accident must have happened in the manner the second plaintiff has described it. The force from the car must have caused the motorcycle to be thrown to the side and one of the plaintiffs to fall on the road where the blood spot is shown in the sketch plan. I find the driver of the car wholly to blame for the accident.

Counsel for the defendant in his submission argues in effect that the defendant cannot be held to be liable even if the court accepts the plaintiffs' evidence fully as there is no evidence to show who was the driver of the car, any connection between him and the defendant and that the driver was the servant or agent of the defendant, the car owner. He further argues that although it is stated in the statement of claim that the servant or agent of the defendant was one Neo Yong Yam, the averment of the defence is to put the plaintiffs to proof of all the allegations; the onus of proof should therefore be on the plaintiffs. For these arguments counsel relies on *Hewitt* v. *Bovin*(1) approved in *Rambarran* v. *Gurrucharran*(2) a decision of the Privy Council.

Counsel for the plaintiffs argues in effect that as in the indorsement the name of the driver is given, the onus is on the defendant, as owner of the car, to prove that the driver was not his servant or agent or that the car was driven by a person without his permission.

The statement of claim states that at the time of the collision the car was driven by Neo Yong Yam, as servant or agent of the defendant. In his defence, the defendant denies every allegation in the statement of claim except the fact of collision. The rule of pleading is clear. Where a defendant denies an allegation of fact in the pleading, he must not do so evasively, but answer the point of substance. A denial must

be specific (see *Mallal's* Supreme Court Practice Volume I at page 284). In this case the denials of the defence are more of a general nature. If in fact the defendant desires to deny that the driver named by the plaintiffs was the defendant's servant or agent he must do so in specific terms.

In determining the question which party has the burden of proof on the issue whether the driver of the car was the servant or agent of the owner, I need cite only two authorities.

In *Barnard* v. *Sully,*[3] Mr. Barnard sued Mr. Sully in the county court for damage done to his van through the negligent driving of Mr. Sully's car. It seems to have been accepted that Mr. Sully was not driving himself, and he denied that the driver was his servant or agent. In the absence of evidence contradicting this denial the county court judge withdrew the case from the jury. Mr. Barnard appealed to a Divisional Court of the King's Bench, but Mr. Sully did not appear and was not represented. Allowing the appeal Scrutton L.J., with whom Greer and Slesser L.JJ. concurred, said:

"No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners... But apart from authority, the more usual fact was that a motor-car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motor-car was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts."

In *Rambarran* v. *Gurrucharran, supra,* Lord Donovan after quoting the above passage said at page 751:

"Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by *A* it can be said that *A's* ownership affords *some* evidence that it was being driven by his servant or agent."

From these authorities it is clear that where a car is driven by a person other than the owner, the presumption is raised that the driver of the car is the servant or agent of the owner. I think the rule is so laid down because in the course of human conduct whether or not the driver is the servant or agent of the owner or whether or not there is connection between the driver and the owner should be within the knowledge of the owner of the car. In the case here, it is admitted that the defendant was the owner of the car. The presumption is raised that the driver was his servant or agent. It is for the defendant to rebut the presumption by proof of the actual facts. Since he has chosen to remain silent, the irresistible conclusion is that the driver was his servant or agent. I therefore find the defendant liable.

Judgment for the plaintiffs in the sum agreed upon in the event of full liability *i.e.* first plaintiff $2,000 general damages, $500 special damages; second plaintiff $4,000 general damages, $600 special damages. Costs to the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *Pillai & Co.; Drew & Napier.*

PUBLIC PROSECUTOR v. LIM CHING CHUAN

[R.Cr.J. (Mohamed Azmi J.) September 10, 1971]

[Kuala Lumpur — Criminal Revision No. 8 of 1971]

Road Traffic — Road tax licence — Driving motor vehicle with expired road tax licence — No third party risks insurance cover — Road Traffic Ordinance, 1958, ss. 21(1) and 74(1).

Criminal Law and Procedure — Judicial precedent — Conflicting decisions from Malaysia and Singapore — Effect — Revision.

Insurance — Policy terms — Interpretation of proviso — Vehicle driven without there being in force a policy in respect of third party risks — Whether policy covered the driver.

The defendant was charged: (1) under section 22(1) of the Road Traffic Ordinance, for driving a motor-car with expired road tax licence, and (2) under section 74(1) of the same Ordinance, for using the said car at the same time without there being in force a policy of insurance in respect of third party risks. He pleaded guilty to the first charge and was fined $150, but he claimed trial on the second charge. In his defence he produced an insurance policy which on the face of it was still valid at the material time. It contained the following proviso in respect of persons or clauses of persons permitted to drive: "Provided that the person is permitted in accordance with the licensing or other laws or regulations to drive the motor vehicle or has been permitted and is not disqualified by order of a court of law or by reason of any enactment or regulation in that behalf from driving the motor vehicle." The learned magistrate found the defendant guilty and sentenced him to a fine of $120 and disqualified him from driving for one year.

The case was brought up for revision because the learned magistrate in his decision relied on the Singapore decision of *Public Prosecutor* v. *Albert See,*[1] but subsequently found it inconsistent with the Malayan decision of *Tan Kuan Chin* v. *Public Prosecutor:*[2]

Held: (1) as there was no evidence that the defendant had not been permitted by law to drive and that he was disqualified by court order from driving the motor-car in question, the defendant appeared to have fallen under the second limb of the proviso to the insurance policy. He had not, therefore, contravened a term of the insurance policy;

(2) it is a well established principle in our judicial system that decisions of a High Court on questions of law are binding on all subordinate courts. Although decisions of a Singapore High Court have a persuasive authority in the courts of this country, in cases where there are conflicting authorities between the two High Courts after "Singapore Day" (August 9, 1965), magistrates and presidents are bound to follow the decisions of our High Court;

(3) thus, the defendant's conviction on the second charge must be quashed, the sentence and disqualification order, set aside.

Cases referred to:-

(1) *Public Prosecutor* v. *Albert See* [1971] 1 M.L.J. 47.

(2) *Tan Kuan Chin* v. *Public Prosecutor* [1959] M.L.J. 252.

CRIMINAL REVISION.

Nik Mohamed bin Nik Yahya (Deputy Public Prosecutor) for the Public Prosecutor.

Defendant appeared in person.

Mohamed Azmi J.: The defendant in this case was charged first under section 22(1) of the Road Traffic Ordinance for driving a motor car No. BH 368 on June 27, 1971 while there was not in force a motor vehicle licence in respect of the said car — the road tax licence having expired on June 15, 1971 — and, secondly, under section 74(1) of the same Ordinance for using the said car on the same date without there